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EFFECTIVE NATIONAL AND INTERNATIONAL ACTION AGAINST: (a) ORGANIZED CRIME; (b) TERRORIST CRIMINAL ACTIVITIES

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INTRODUCTION

A. The current situation

1. A rapid increase in transnational crime has taken place in recent decades. This alarming trend has been spurred by the advances in technology and communications and the unparalleled growth of international commercial and economic activity, transportation and tourism. Transnational criminal organizations have effectively exploited this new and more fluid international environment and, as a result, crime has not only expanded but has also become more profitable.

2. The internationalization of organized crime is reflected in the proliferation of illegal world markets for drugs, stolen goods, arms and other illicit goods and services supplied and manipulated through a world-wide network of criminal commercial transactions. They are believed to be worth hundreds of billions of dollars: sums comparable to the budgets of some of the largest transnational corporations and exceeding the national budgets of many States.

3. As organized crime groups have developed increasingly sophisticated criminal techniques, the patterns of their evolution and their impact have surpassed the present control capabilities of individual countries. It seems necessary, therefore, to review, based on a thorough analysis of the ways in which organized crime is structured and taking into account both prevention and control functions, all strategies directed against this phenomenon.

4. Not only are the illicit activities of organized crime managed in accordance with many modern business administration techniques and characterized by high efficiency and profitability, but tactics of violence, intimidation and corruption are often used as an integral part of their modus operandi. The illegal activities are often integrated into legitimate enterprises (e.g. hotels, import/export trading corporations). Substantial difficulties are encountered by law enforcement agencies in the detection and prosecution of perpetrators. When legal action is successful, it rarely results in the destruction of the organization itself, since replacement personnel is readily available.

5. The frequency and lethal impact of terrorist criminal acts have also increased in recent years: global competitive arms sales make modern weapons easily available to terrorist groups, mass communications assure instantaneous publicity for terrorist acts and relaxed international travel conditions facilitate escape and impunity. As a result, countless innocent persons are exposed to the danger of indiscriminate violence. This often leads to insecurity, demoralization and a rampant scepticism among the citizenry about the capability of government authorities to cope with the threat.

6. The international dimensions of contemporary terrorism manifest themselves in a number of ways. Terrorist attacks may be decided and prepared in one country and carried out in another. In hijacking cases, the entire drama may unfold in still other countries before reaching its final violent or negotiated conclusion. "State terrorism", in which terrorist acts are organized or encouraged by a State for the purpose of intimidating another State, group or organization, creates additional obstacles to effective prevention and control. These factors have underlined the need for a collective reponse by the international community and greater co-operative efforts by Governments, as no single Government can deal by itself with these matters.

B. The response of the United Nations

7. In 1975, the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders made a number of recommendations to cope with organized crime and terrorism, including the formulation of a new international convention against illicit trafficking in drugs containing improved extradition procedures and mutual assistance arrangements (see A/CONF.56/10). The Economic and Social Council and the General Assembly have concurred in the analysis of the dangers posed by these crimes and the necessity of urgent action as recommended by the Committee on Crime Prevention and Control and the crime congresses. In 1985, the Seventh Congress adopted the Milan Plan of Action, which affirms that it is "imperative to launch a major effort to control and eventually eradicate the destructive phenomena of illicit drug traffic and abuse and of organized crime, both of which disrupt and destabilize societies". In addition, it asserts the need to give priority to combating terrorism in all its forms. 1/

8. The Seventh Congress also adopted three specific resolutions in these areas. In its resolution 1 on organized crime, the Seventh Congress recommended that Member States consider taking measures on such matters as the modernization of national criminal law and procedures, and of extradition and mutual assistance legislation; and the adoption of provisions for the forfeiture of illegally acquired assets. The resolution also recommended the strengthening of law enforcement authorities and the establishment of national institutions with appropriate powers to investigate those centrally involved in organized crime; and the revision or adoption of laws relating to taxation, the abuse of bank secrecy to ensure their effectiveness in dealing with the fight against organized crime, and the transfer of funds for or of the proceeds of crime across national boundaries. The resolution further recommended the development of model treaties on extradition and mutual legal assistance, and of a comprehensive framework of guidelines and standards to deal with organized crime at the national, regional and international levels.

9. In resolution 2 on illicit drug trafficking, Member States were invited, inter alia, to introduce or strengthen all legal instruments that could facilitate the tracing, freezing and forfeiture of the proceeds from illicit traffic, and to take all necessary legislative measures to maximize co-operation between States in investigating illicit profits and effecting their forfeiture.

10. In resolution 23 on terrorist criminal acts, all States were called upon to take all necessary measures to ensure full observance of the obligations contained in the relevant conventions to which they were parties. Further, all States that had not become parties to the relevant multilateral conventions were invited to consider doing so expeditiously. States were also urged to adopt legislation to strengthen legal measures against those who commit acts of terrorism and to facilitate the exchange of information in order to improve the ability of Governments to prevent violence, and to facilitate the effective application of law enforcement measures with respect to those who commit violent terrorist acts, to rationalize extradition procedures and to avoid inappropriate exceptions. States were also called upon to take the necessary steps to strengthen co-operation, particularly in the areas of extradition and mutual legal assistance. The resolution also called for the development of recommendations for international action to strengthen law enforcement measures regarding terrorism.

11. The General Assembly, in its resolution 40/32 of 29 November 1985, approved, inter alia, the Milan Plan of Action and endorsed the aforementioned resolutions of the Seventh Congress and, by resolutions 41/107 of 4 December 1986, 42/59 of 30 November 1987, 43/99 of 8 December 1988 and 44/72 of 8 December 1989 on crime prevention and criminal justice, urged the international community to apply the recommendations contained in the Milan Plan of Action, while the Economic and Social Council, in its resolution 1986/10 of 21 May 1986, urged the Secretary-General to accord priority to the development of specific proposals to co-ordinate concerted international action against the forms of crime identified in the Milan Plan of Action.

12. The Economic and Social Council, in its resolution 1989/70 of 24 May 1989, and the General Assembly, in its resolution 44/71 of 8 December 1989, on international co-operation in combating organized crime requested, inter alia, the Committee on Crime Prevention and Control to consider ways of strengthening international co-operation in this field, taking due account of the opinions of Governments, international organizations and non-governmental organizations, as well as opinions expressed at and decisions taken by the Eighth Congress.

13. Further, the General Assembly, at its seventeenth special session, by resolution A/S-17/2 of 23 February 1990, adopted the Political Declaration and Global Programme of Action devoted to the question of international co-operation against illicit production, supply, demand, trafficking and distribution of narcotic drugs and psychotropic substances. The Declaration notes, inter alia, that the large financial profits derived from illicit drug trafficking and related criminal activities enable transnational criminal organizations to penetrate, contaminate and corrupt the structure of Governments, legitimate commercial activities and society at all levels. Many of the actions recommended in the Global Programme of Action, in particular as they refer to money laundering and the strengthening of judicial and legal systems, are actually aiming at drug trafficking, which is one particular aspect of organized crime.

14. Regarding terrorism, the General Assembly adopted resolutions 3034 (XXVII) of 18 December 1972, 31/102 of 15 December 1976, 32/147 of 16 December 1977, 34/145 of 17 December 1979, 36/109 of 10 December 1981 and 38/130 of 19 December 1983. A turning point was General Assembly resolution 40/61 of 9 December 1985, in which all acts, methods and practices of terrorism wherever and by whomever committed were unequivocally condemned, and the loss of innocent human lives resulting from terrorist acts and the pernicious impact of such acts on relations of co-operation among States was deeply deplored.

15. More recently, the General Assembly adopted resolution 44/29 of 4 December 1989, which includes such elements as the right to self-determination of peoples and to struggle legitimately to this end, which is a safeguard clause. The Assembly convinced that a policy of firmness should be taken in accordance with international law to bring an end to terrorism, recognized that establishing a generally agreed definition of international terrorism could enhance the effectiveness of the struggle against it; unequivocally condemned terrorist acts as criminal and not justifiable, and requested the Secretary-General to solicit the views of Member States on ways and means of enhancing the role of the United Nations and its relevant specialized agencies in combating international terrorism.

I. ORGANIZED CRIME

A. Nature of organized crime

1. Structural aspects

16. It is impossible to gather under a definitional umbrella the many different types of organized crime, which vary according to different factors, including those of ethnic origins and market opportunities. 2/ However, by combining various approaches it is possible to characterize the phenomenon as a series of complex criminal activities carried out on a large scale by organizations or other structured groups, with financial profit and the acquisition of power as the predominant motives, by establishing, maintaining and exploiting markets for illegal goods and services. These are crimes often transcending national boundaries and linked not only with the corruption of public and political figures, through graft or collusion, but also with threats, intimidation and violence. 3/

17. The evolution of organized crime can be regarded as a process of rational reorganization of criminality following the same patterns as legal enterprises operating in legal markets, reflecting a trend towards greater organizational complexity characteristic of modern developed societies. 4/ The criminal enterprise, however, follows its ends by engaging in specific illicit activities, such as dealing in illegal goods and services, by acquiring a monopolistic position in the market by the use of violence against competitors, and by the use of corruption and intimidation against law enforcement agencies to reduce the risk of prosecution.

18. The structure of such groups, commonly studied in North America and Europe, but present as well in other regions, varies considerably. Some consist of a number of "families" or hierarchical organizations which are closely linked in a syndicate. 5/ Others may be less organized and may be seen mainly as criminal networks. 6/ Structures vary over time and according to different illegal industries and locations. 7/ For instance, groups traditionally connected with a geographical territory and active mainly at the local level have started to operate on the international level in response to different needs connected with the illicit drug market: production, trade, smuggling, distribution, cash laundering and its investment in illicit and licit activities. Similar developments can be seen in the illicit arms trade.

19. Increased cocaine demand and limited areas of coca cultivation led to the development of a constellation of organized groups or cartels in South America, with bases world-wide. The cartels may purchase the entire production of coca leaves from specific countries or areas and manufacture and smuggle cocaine through different routes to organized networks in consumer countries.

20. Much older criminal organizations exist in the Asian region, some of which have evolved from secret societies developed for political purposes in past centuries. Others have developed into hierarchical structures similar to those for organized crime in other regions.

2. Activities of organized crime

21. Organized criminal activities involve a number of illicit actions, such as breach of trust, extortion and physical violence, and even murder and mutilation. Although illicit drug trafficking accounts for a large share of organized crime's criminal transactions, these illegal operations also include

trafficking in weapons, industrial secrets and other confidential information, works of art, gold, precious stones and human organs, migrant labour as well as female and child prostitution, to mention only the most visible.

22. A critical trend has been the rapid penetration of legitimate business to invest illegally acquired funds, thus establishing a "clean" façade for criminal operations and reducing commercial risk by diversifying investments. This infiltration is motivated by the pressing need to launder at least part of the huge profits yielded by criminal operations. Since only the smaller part of such profits needs to be used for the continuation of the criminal enterprise, the surplus requires disguising to be invested otherwise. It is therefore channelled, for example, through off-shore financial centres, going into overseas holdings and being absorbed in the international capital flow. As a result, the entire legal market can become conditioned by this illegal flux of money and dependent on the revenues generated by criminal activities.

23. A very important area that organized crime has traditionally infiltrated is that of public contracts. 8/ Another extremely harmful organized crime activity is the dumping of toxic or radioactive wastes. Emerging forms of organized crime, particularly in developed countries, are entitlement frauds, such as fraudulent claims for unemployment benefits, insurance fraud, credit card fraud and fraudulent immigration schemes.

24. The activities of organized crime tend to be even more destructive in the often highly vulnerable developing countries. Organized crime has sometimes deeply infiltrated public administration and political structures, including the armed forces. It undermines the democratic process, obfuscates ethical norms and causes resignation, with pervasive effects on every aspect of society. Bribes, payoffs and donations to political campaigns are prime ways in which criminal organizations have sought to achieve political influence and protection from prosecution. Widespread corruption constitutes a serious impediment to international co-operation and the provision of aid, since key officials may be compromised.

25. The rationalization and continued "technologization" of criminality is likely to influence profoundly the nature of crime in the coming years. A functional interdependence has developed that increasingly links traditionally separate areas of criminality. Common crime (violence and theft), political crime, organized and economic crime are all increasingly drawn into this process (see chapter III, below).

B. Money laundering

26. The need to launder illegally acquired funds represents the most vulnerable spot in the structure and functioning of organized crime and is the main reason for the search for financial havens. Bank secrecy facilitates laundering and adds to the difficulties in tracing assets obtained by illegal means.

27. Various international organizations or groups, such as the International Criminal Police Organization (Interpol), the Council of Europe, the Commission of the European Communities and the Financial Action Task Force convened by the Governments of the seven major industrial countries, have already reviewed this problem. The issue is addressed, although from different viewpoints, through the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (see E/CONF.82/15 and Corr.1 and 2), the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 9/ the proposal for a Council directive on prevention of

the financial system for the purpose of money laundering 10/ and the Statement of Principles of the Committee on Banking Regulations and Supervisory Practices at Basel. 11/ Although the Convention primarily concerns illicit drug trafficking, it contributes to further progress by, inter alia, creating an obligation to criminalize drug money laundering, facilitating judicial co-operation and extradition; and establishing the principle that banking secrecy should not interfere with criminal investigations.

28. The Basel Statement of Principles, recognizing that public confidence in banks may be undermined by their association with criminals, outlines some basic principles with a view to combating money laundering operations through the banking system by, inter alia, customer identification; compliance with laws and regulations pertaining to financial transactions and a refusal to assist transactions that appear to be associated with money laundering; and co-operation with law enforcement authorities, to the extent permitted by regulations relating to customer confidentiality. Although practical measures have already been taken in many countries, such as the appointment of compliance officers in banks in charge of applying internal programmes against money laundering, other bank secrecy laws and the existence of anonymous bank accounts in many countries still go beyond what seems to be required for licit business activities. This facilitates laundering and creates difficulties in tracing assets.

29. The Financial Action Task Force recently agreed to the following working definition to describe the process of money laundering conduct or behaviour:

> "- the conversion or transfer of property, knowing that such property is derived from a criminal offense, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offense or offenses to evade the legal consequences of his actions;
>
> "- the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from a criminal offense;
>
> "- the acquisition, possession or use of property, knowing at the time of receipt that such property was derived from a criminal offense or from an act of participation in such offense." 12/

30. Money laundering can be a complicated process with international dimensions that require close examination.* Business and financial enterprises involved can include deposit-taking institutions, currency exchange houses, the securities market and real estate corporations. Various devices are used: utilizing more than one account, branch and institution in one laundering operation; employing money couriers with false identifications to open accounts; utilizing fake currency exchange houses to deposit large amounts into banks without raising suspicion; establishing legitimate or shell

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*Based upon quantitative evidence derived from an analysis of Canadian police cases, it is estimated that 80 per cent of illicit money generated in Canada through illegal activities is either taken out of the country to launder or illicit money generated elsewhere is brought into Canada for laundering.

companies as fronts; purchasing securities through nominee accounts; utilizing stock certificates issued in bearer form; passing funds through corporations in business activities, thus creating a difficult paper trail; moving illicit funds across borders to obscure their true source and to obstruct financial investigations; and many other methods.

31. Organized criminal activities are often uncovered and pursued by following financial operations in a determined fashion. Since organized crime is directed towards the accumulation of money and power, one of the most successful methods of identifying and ultimately convicting major organized criminals is to "follow the money trail". The enjoyment by a criminal of his profit, as well as all transactions in the money laundering process, usually leave behind some sort of record. The money spent can be traced by utilizing relevant data, such as those generated by banking, taxation, immigration, passports, customs and police intelligence operations, and by the acquisition and sale of assets. The legal authority to obtain information in these areas often exists, but is fragmented by being dispersed in various statutes and between separate agencies. In these circumstances, it is comparatively easy for those who wish to do so to hide their activities from investigators. Improved methods of co-ordination and data collection are therefore required.

C. Action against organized crime

1. General framework

32. Traditional approaches have sought to combat organized crime particularly by a strengthened law enforcement capacity. This approach has often led to only superficial disturbances of criminal operations, achieving only minor reductions in the total volume of illegal activities. Criminal sanctions, if they are not accompanied by a range of other measures, have a limited deterrent effect and only marginally affect illegal activities.

33. Organized crime necessitates a strong reaction by States. Many measures to confront organized crime may involve restrictions of civil rights, such as special investigation methods, that may include an intervention in the right to privacy, restrictions of procedural rights or a shift of the burden of proof. Each approach will have advantages and disadvantages. Policy makers, as well as practitioners, all too often will be confronted with conflicting interests. They need to evaluate measures to see what will be gained in efficiency and what might be lost in personal liberties. Any solution to escape from this double-bind situation would have to balance human rights, constitutional rights and the rule of the law against the efficiency of law enforcement actions. This implies control measures of such law enforcement actions at various levels, such as parliamentary control commissions for certain types of measure and the surveillance and approval of such measures in individual cases by a judge.

2. Prevention and control strategies

34. At a national level it is possible to design optimal integrated and co-ordinated strategies against organized crime groups and their activities. The measures would cover separate but interrelated aspects such as prevention, criminal legislation, criminal investigation, law enforcement and criminal justice administration, supported by effective means of international co-operation based on the concept of shared responsibilities.

(a) Prevention

35. Detailed prevention programmes designed to deter a potential offender, reduce opportunities for crime and make its commission more conspicuous need to be encouraged. Fraud control programmes in the public sector are an example of a significant step in this direction. In addition, crime impact statements identifying the criminogenic potential of new programmes could be considered, as they provide opportunities for adopting remedial and preventive measures at the planning stage. Commissions of inquiry may be useful mechanisms for publicly exposing organized criminal activity and focusing attention on prevention programmes.

36. Raising public awareness of the operations and extent of organized crime and mobilizing public support for its prevention and control are important elements of a concerted strategy. Mass media may need to be closely involved in furthering preventive programmes. For instance, national inquiries into and national campaigns against drug abuse can, with strong media support, be influential in gaining public acceptance of programmes for demand reduction and social control of drug abuse. Mobilizing the media is thus extremely important, and journalists should be motivated and assisted in this work.

37. An important preventive strategy is to examine the characteristics of legal and illegal markets serviced and exploited by organized crime groups and to adopt new regulatory policies to increase competition. These policies can change the structure of opportunities within the industries infiltrated or ruled by organized crime. They may consist of the legalization of the goods sold on the illegal market, as has been done for alcohol and gambling, and as is frequently proposed by some for drugs, or they may attempt to exert an anti-monopolistic effect on markets monopolistically controlled by organized crime groups, such as the construction, carting and other industries. Where these policies exact high economic and social costs, it will be necessary to evaluate, situation by situation, the different results produced by regulative or deregulative policies.

(b) An integrated approach to criminal legislation

38. Legislative action is necessary if more effective strategies against organized crime are to be implemented. The legislative package should encompass a number of issues, such as the creation of new offences related to money laundering and other activities. Detailed legislation may also be required on specific problems encountered in particular industries and in particular jurisdictions. In addition, where possible, criminal enterprises themselves, not only their employees or members, should be subject to criminal liability, based on the principle of corporate responsibility.

(i) Creation of new offences

39. As all the activities of organized crime cannot be dealt with effectively by traditional notions of crime, the creation of new offences merits consideration.* Legislation on these matters would apply to narcotics offences, organized fraud and money laundering as well as the proceeds of such offences. Anti-corruption laws may also have to be enacted. These laws would, inter alia, require public officials, local administrations and politicians to

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*See, for instance, the Australian Proceeds of Crime Act 1987, which, inter alia, introduced new offences of money laundering and organized fraud.

disclose their assets and authorize bodies to investigate cases of sudden enrichment, or of a lifestyle inconsistent with known sources of income. In addition, legal provisions that criminalize certain behaviours, such as ancillary acts including financial support to criminal organizations, should be elaborated and implemented. It would be beneficial to study in some countries experiences of criminal associations, conspiracy or membership in mafia-type organizations in the field of criminalization.

(ii) Co-operative witnesses

40. Co-operative witnesses and informants have successfully contributed, in many countries, to the prosecution and conviction of many organized crime members. A witness may co-operate because of conflict with the criminal organization or because of inducement by a law enforcement agency. Co-operation may be provided in exchange for the promise of a reduced penalty for crimes committed or other advantages. It is very important that sufficient protection be provided for witnesses and for the direct victims of organized crime. The co-operation could be explicitly provided (e.g. by security programmes) and allowed by the judicial system and procedure (e.g. plea bargaining).

(iii) The tracing, monitoring and forfeiting of the proceeds of crime

41. Legislation would deal with tracing, seizing and forfeiting the proceeds of crime, and reporting cash transactions. Courts would be authorized to grant orders to freeze and confiscate property used in, or derived directly or indirectly from, criminal activities. In addition, there would be provisions to enforce, within the State, foreign freezing and confiscation orders, pursuant to mutual assistance treaties. Confiscation orders could take the form of either forfeiture orders or orders for pecuniary penalties or, where appropriate, a combination of both. Third parties who could establish that they were not involved in committing the offence could be exempted.

42. Such legislation needs to empower law enforcement officials to gain access to documents required to follow the money trail. Provisions could be made to issue production orders by judges, directing that such documents be produced, or a monitoring order, directing a financial institution to give information within specified periods of time to law enforcement authorities on transactions conducted through accounts held by a particular person or organization. Legislative provisions relating to cash transactions could also be introduced to complement the provisions on crime proceeds, since cash is an important part of financing criminal activity.

43. Under such legislation, certain types of transactions would have to be reported to a specified agency. These would include large-scale cash transactions, suspect transactions, and foreign currency exports and imports over a prescribed level. The legislation would apply to cash dealers, including financial institutions, bookmakers, casinos and other concerns, varying from country to country. An important supplementary requirement would be to verify the identity of account holders. This would address the proliferation of accounts opened anonymously or under false names. To deal with this problem, a legislative provision may be required to make opening and operating accounts under a false identity a punishable offence.

(iv) Pecuniary penalty orders

44. Pecuniary penalty orders against offenders would be provided for in accordance with the following process: the court would assess the benefit that the offender derives, directly or indirectly, from committing the

offence, assign a monetary value to that benefit and make an equivalent pecuniary penalty order that would then be enforced as a civil debt and be provable in bankruptcy. The legislation should empower courts to look behind the legal ownership of property to determine whether it is subject to effective control by the defendant. In the case of serious narcotics offences, organized fraud and associated money laundering, the legislation could provide for statutory forfeiture and/or a pecuniary penalty. These provisions would take into account the seriousness of the criminal behaviour, its social implications and the need to deal with it effectively. It would also deal with the problem of persons seeking to move property beyond the given jurisdiction once they became aware that charges were about to be laid. Powers would be given to seize tainted property and temporarily hold it pending the issuance of a restraining order.

45. The legislative framework would need to be supplemented with statutes dealing with particular forms of organized crime in specific industries. For example, labour racketeering and corruption require proscribing the acquisition of an enterprise with funds derived from these activities. Civil penalties could also be provided to order a person to divest himself or herself of any interest in an enterprise, or ordering the dissolution or reorganization of the enterprise.

(c) Criminal investigation and law enforcement

46. A successful control strategy cannot limit itself to granting powers and creating offences. There is the need to increase investigation and prosecution effectiveness and to provide legislative support for new intelligence-gathering models based on the technique of following the money trail. Incentives are needed to motivate organized crime members to co-operate and to further develop specific undercover techniques.

47. Because fragmentation often exists regarding different regulatory and investigative powers, the most effective action may be either ensuring that all efforts at the operational level are properly co-ordinated or establishing a specific agency to deal with organized crime. The agency would be empowered to obtain information, subject to safeguards guaranteeing fundamental rights and ensuring proper accountability. It could bring together lawyers, accountants, financial analysts, computer experts and corporate affairs investigators, as well as experienced police investigators. The safeguards should include control by competent authorities, which would refer matters to the agency after considering whether ordinary police methods of investigation were unlikely to be effective; a condition that members of the agency be appointed for fixed terms without eligibility for reappointment; the requirement to report to legislative bodies; and separate monitoring and review by, inter alia, a parliamentary committee. Establishing ad hoc task forces with representatives of relevant enforcement agencies to work together on specific operational projects is another option.

48. If effective control of organized criminal activity is to be attained, improved methods of data collection will have to be introduced. This requires strengthening the resources of law enforcement agencies. For example, computer technology and telecommunication interception powers are needed with respect to serious offences, subject to stringent safeguards.

3. International co-operation

49. Organized crime is now largely transnational and demands a commensurate international response sustained by a strong political commitment and by adequate means, in accordance with the principles of international solidarity

and the collective responsibility of States. Targeting only one sector or country seems futile: when one institution or country is shut off to launderers, they simply shift to another sector or country that is more accessible. The extent and ramifications of organized crime, its widening reach and pernicious effects, linkages with other forms of criminality, and its connection with the accumulation of economic power require new global strategies that elevate those problems from purely domestic matters to crucial international policy issues. World-wide joint action, including action by the United Nations, is an important part of such an integrated strategy.

50. Model national legislation could be developed and promoted by the United Nations. In addition, the basic elements of co-operation could be developed for inclusion in a convention; one example of such an instrument is the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Draft model treaties on extradition and mutual assistance in criminal matters are before the Eighth Congress for its consideration, and may be a first step towards the elaboration of such a convention.

51. Another aspect of international co-operation could aim at progressively reducing anonymity in bank transactions and, in the meantime, seeking a minimum of information in respect of major banking and financial transactions and centralizing it in national data banks linked in an international information network. To deal with the difficulty of enforcement at the international level, the United Nations could study the feasibility of a transparency clause, the observance of which would be the minimum condition for participating in the international financial system. Other agencies could be requested to integrate, in their programmes, the recommendations of United Nations certification reports acknowledging compliance with the relevant international instruments.

52. Technical co-operation should be strengthened to share experiences, as well as to assist countries. Co-operation in strengthening controls and registering movements through entry points to make them less vulnerable to penetration is indispensable. Appropriate equipment is needed to detect illicit narcotics, illegal arms and counterfeit documents such as passports. Extending national jurisdiction over illegal activities of organized criminal groups on the high seas and in international airspace could be considered. Immigration control systems should be improved. The international community should urge countries that provide passports to foreigners in exchange for investments to re-examine their legislation and deter abuses. Full implementation of international conventions on the use of mail services by organized crime is also important.

53. Another valuable service would be the establishment of an international information centre, to disseminate to interested Governments information on laws or measures taken against organized crime.* The United Nations Criminal Justice Information Network (UNCJIN) offers possibilities in this regard.

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*A step in that direction was made by the General Assembly in its resolution S-17/2 of 23 February 1990, paragraph 65, which states that the Division on Narcotic Drugs and Interpol shall be invited to develop a repository of laws and regulations on money laundering, currency reporting, bank secrecy and forfeiture of property and proceeds, as well as procedures and practices designed to prevent banking systems and other financial institutions from money laundering.

54. Manuals and bulletins on how to establish multisectoral action programmes against organized crime, as well as on measures to deal with money laundering and successful new investigative techniques, may be of considerable assistance to countries.

55. In relation to law enforcement, co-operation between countries can take many forms in relation to intelligence and investigation, the police and the judiciary. One example could be working groups on organized crime, consisting of members of the relevant agencies of States that are parties to a bilateral mutual assistance treaty. Organized crime takes advantage of the fragmentation of governmental effort; sharing information and joint investigation are two essential elements of effective counter action.

II. TERRORIST CRIMINAL ACTIVITIES

A. Nature and extent of terrorism

56. Terrorist activities have increased in recent years and their impact has now been felt in countries that had not previously faced the consequences of such violence. The available data on international terrorist incidents since the late 1960s reveals that there has been a marked increase: from 126 in 1968 to 607 in 1980 and 856 in 1988. Perhaps as a result of more stringent countermeasures incidents declined to 528 in 1989. Similarly, the number of casualties rose from 241 in 1968 to 1,569 in 1980, reaching 2,905 in 1987, decreasing, however, to 1,790 in 1988 and to 1,079 in 1989. This increase, as well as the sophistication of the methods and weapons used, has prompted calls for international action, as it is realized that the stability of States is threatened and that national measures alone have been ineffective in dealing with the complex and tight organization of the perpetrators. Estimates of the total number of international terrorist incidents, their analysis by geographical area, type of attack, intended target of victim and number of victims, both dead and wounded, are given in the table. These figures are for international terrorist incidents only. There are no universally accepted statistics on terrorism. However, the broad picture indicated by these statistics tends to conform with generally held perceptions of the extent and nature of the phenomenon.

57. International personalities are, because of their visibility and importance, an attractive target for terrorist groups. Their victims are often State leaders and influential figures in political and financial circles. The goal is to shock and alarm in order to draw as much attention to their cause as possible. In this manner, terrorism introduces a random and highly dangerous element into international relations.

58. Another objective of terrorism is to weaken, by violent crimes, the commitment of Governments to human rights and the rule of law, provoking them in this manner to indiscriminate and harsh repression. Pressure on the authorities to deal swiftly and successfully with the terrorist threat may lead to over-hasty reaction. As a result, suspension of constitutional guarantees and infractions of legality may be perceived as justifiable in view of the gravity of the threat. It is precisely such reaction that is one of the main aims of terrorist activities.

59. A major element of terrorism is psychological warfare. Having as an ultimate objective the seizure of power, terrorists design their activities in such a manner as to exploit to the full existing governmental faults and

International terrorist incidents, 1968-1987
(Percentage of total)

	1968	1970	1975	1980	1981	1982	1983	1984	1985	1986	1987
Total	125	309	382	532	496	477	485	598	785	774	831
By region a/											
Africa, Sub-Saharan	0.0	3.6	6.3	4.7	3.8	3.4	4.1	7.5	5.5	2.6	3.5
Asia/Pacific	0.8	7.8	5.8	5.5	3.0	5.9	7.6	4.5	5.4	9.9	20.8
Eastern Europe and USSR	0.0	0.3	0.5	0.6	1.4	1.0	0.4	0.2	0.3	0.0	0.1
Latin America	36.0	41.4	17.5	24.8	22.6	20.1	24.9	13.9	15.2	20.5	13.0
Middle East	14.4	12.9	18.3	22.2	19.6	10.7	22.1	34.3	45.5	46.5	44.5
North America	32.0	8.1	15.4	6.4	6.3	6.7	1.9	0.8	0.5	0.3	0.0
Western Europe	16.8	25.9	36.1	35.9	43.3	52.2	39.0	38.8	27.8	20.2	18.1
By type											
Bombing	66.4	40.5	51.0	42.3	50.8	55.3	51.2	50.7	48.4	59.2	56.9
Armed attack	16.8	11.0	13.6	31.8	20.6	14.8	15.1	23.3	17.1	16.7	15.7
Arson	9.6	18.1	11.3	8.6	9.4	15.2	9.5	9.7	12.4	14.3	18.0
Kidnapping	0.8	13.9	14.7	3.0	4.9	6.5	8.1	7.7	10.6	6.1	6.4
Skyjacking	2.4	5.8	1.0	1.5	2.4	1.0	1.2	1.7	0.7	0.2	0.1
Other	4.0	10.7	8.4	12.8	12.0	7.1	14.9	7.0	10.8	3.4	2.9
By target											
Business	17.5	15.7	28.0	17.3	15.3	23.0	13.2	22.9	23.5	24.9	20.0
Diplomat	31.7	29.5	28.0	36.4	38.3	33.8	33.5	18.5	9.4	10.1	7.6
Government	20.6	20.0	6.9	8.7	6.99	5.9	10.0	11.7	9.5	10.9	9.2
Military	2.4	5.9	3.5	8.6	9.1	11.5	16.2	7.4	6.9	6.0	8.7
Other	27.8	28.9	33.7	29.0	30.3	25.8	27.1	39.5	50.6	48.0	54.5
Number of victims											
Total	241	336	782	1 569	972	883	1 904	1 279	2 042	2 321	2 905
Dead	34	127	266	507	168	128	637	312	825	604	612
Wounded	207	209	516	1 062	804	755	1 267	967	1 217	1 717	2 293

Source: Report on the World Social Situation (United Nations publication, Sales No. E.89.IV.1, 1989), p. 79. US Department of State, Office of the Co-ordinator for Counterterrorism.

deficiencies. Terrorist operations, at both the national and international levels, target economic institutions, aiming at their destruction and attempting to undermine public administrations at all levels. The patterns of attacks appear to have a common element: they take advantage of the horror created by disproportionate, organized and extreme violence in surroundings that, by themselves, create a sense of helplessness (i.e. aircraft in flight). The indiscriminate loss of life is not always ancillary or incidental to the achievement of the intended objective; it is rather a calculated result, intentional and foreseen. It is aimed at making the act sensational enough to attract publicity. It is an act of atrocious symbolism linked with the underlying concept that violence and death are the price for the support of policies, that responsibility for the actions of Governments lies collectively on all their citizens and that since the people whom terrorists claim to represent suffer, so must others. This technique has been used extensively in the efforts of terrorists to mobilize support and find plausible justification for their actions.

B. International efforts against terrorism

60. The problem of terrorist criminal activities has been at the centre of international debate for decades. Its political complexity and the great divergence of views on the subject have hindered effective counteraction. Efforts aimed at the achievement of consensus have also been frustrated by unfavourable conditions in the international climate.

61. The international community and numerous scholars have been attempting, since the time of the League of Nations, to formulate a universally acceptable definition of terrorism. The attempt to define the phenomenon, however, inevitably implies not only political but also ethical considerations. An acceptable definition would perhaps be made easier if it were accepted that crimes committed by terrorists fail to pass the test of compliance with international laws governing armed conflict. This test could provide a basis for minimum consensus.

62. An effort to define terrorism was made in 1937 with the Geneva Convention for the Prevention and Punishment of Terrorism, 13/ in which terrorist acts were described as "criminal acts directed against a State and intended and calculated to create a state of terror in the minds of particular persons or a group of persons or the general public". The Convention never came into force, but its elements are worthy of study. One of these elements is that while it listed the acts that are considered to comprise terrorism, it did not describe any of them as political. Defining terrorism as a criminal activity may be the key to breaking the deadlock that has prevented effective action against it at the international level. This would help to distinguish terrorism from regular armed struggle or even from insurgency or partisan warfare. It has also been recognized that liberation struggles should be conducted in accordance with the principles embodied in the Charter of the United Nations, the 1907 Hague Convention respecting the Laws and Customs of War on Land, the 1949 Geneva Conventions and the supplementary protocols of 1977, 14/ as well as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in its resolution 2625 (XXV), annex, of 24 October 1980.

63. Another approach has been suggested and partly adopted in efforts to combat terrorism. Based on the established principle that terrorist violence in all forms and manifestations, irrespective of reasons, goals or motivation, is of a criminal nature and is, as such, to be universally condemned and

subject to prosecution, this approach consists of identifying particular acts of terrorism and establishing measures against them. The practical advantage in this case lies in the fact that the impact of certain acts is such that Governments are, or may be, willing to subscribe to measures against them. Describing acts that Governments agree on proscribing as crimes in their own national legislation provides a way of building consensus slowly but effectively, while theoretical endeavours towards an all-encompassing definition continue.

C. International conventions against terrorism

64. The General Assembly, in its resolution 2625 (XXV), annex, adopted the principle that each State should refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts. As a result, an Ad Hoc Committee on International Terrorism was established, which submitted its first report to the Assembly in 1979. 15/ In addition, agreements covering certain specific terrorist crimes have been reached. These agreements include the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed in Tokyo on 14 September 1963, 16/ the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, 17/ the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971, 18/ the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly in its resolution 3166 (XXVIII), annex, of 14 December 1973, the International Convention against the Taking of Hostages, adopted by the General Assembly in its resolution 34/146, annex, of 17 December 1979, and the Convention on the Physical Protection of Nuclear Material, concluded at Vienna on 3 March 1980. In February 1988, under the auspices of the International Civil Aviation Organization, a Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation was adopted to supplement the 1971 Montreal Convention. Finally, under the auspices of the International Maritime Organization, a Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, as well as a Protocol relating to platforms located on the continental shelf, was adopted in March 1988.

65. There are two other multilateral conventions which, although not aimed specifically at terrorism, serve a similar purpose. The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, adopted by the General Assembly in its resolution 2826 (XXVI), annex, of 16 December 1971, prohibits the development, production or stockpiling of microbiological and biological agents (weapons). Similarly, the Convention on the Physical Protection of Nuclear Materials (Convention on Nuclear Materials, 1980) prevents parties from exporting or importing, or authorizing the export or import of nuclear materials used for peaceful purposes, unless assurances are given that such material will be protected at prescribed levels during international tran port. The Convention on nuclear materials also provides a framework for international co-operation in the recovery and protection of stolen nuclear materials, and requires that States Parties make punishable certain activities involving nuclear materials, and that they extradite or prosecute offenders.

66. These conventions seek to suppress international terrorism by establishing a framework for international co-operation between States. The Convention on Protected Persons, for example, requires States Parties: (a) to co-operate

in order to prevent, within their territories, preparations for attacks on internationally protected persons within or outside their territories; and (b) to exchange information and co-ordinate administrative and other measures against such attacks. If an attack against an internationally protected person takes place and an alleged offender has fled the country in which the attack occurred, States Parties are to co-operate in the exchange of information concerning the circumstances of the crime and the identity of the alleged offender. Any State Party where the alleged offender is found is obliged to take measures to ensure his or her presence for the purpose of prosecution or extradition and to inform, through the Secretary-General of the United Nations, interested States and international organizations of the measures taken. Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings including the supply of all evidence at their disposal.

67. A key feature of these conventions is that they impose a clear obligation on State Parties to apprehend an alleged offender in their territory and either to extradite or to submit the case to their own authorities for purposes of prosecution (aut dedere aut judicare). The obligation, however, is not to try the accused, but to submit the case to be considered for prosecution by the appropriate national prosecuting authority. If the prosecuting State's criminal justice system lacks integrity, the risk of political intervention may prevent the trial or conviction of the accused, or may act as a mitigating influence at the sentencing stage. Strictly speaking, none of these conventions alone creates an obligation to extradite; instead, by requiring the submission of alleged offenders for prosecution if extradition fails, they contain an inducement to extradite. Moreover, a legal basis for extradition is provided either in the convention or through the incorporation of the offences mentioned in the convention into existing or future extradition treaties between the parties. To varying degrees, the conventions also obligate the parties to take the important practical step of attempting to apprehend the accused and hold the accused in custody.

68. Even if the prosecuting State's criminal justice system functions with integrity, it may be difficult to obtain the evidence necessary to convict the accused when the alleged offence was committed in another country. This practical impediment to conviction could be removed by an expansion of mutual assistance arrangements and other forms of co-operation between countries, in pursuance of the recommendations contained in Security Council resolution 579 of 18 December 1985. It is to be hoped that the new Model Treaty on Mutual Assistance in Criminal Matters, now before the Eighth Congress, will aid Member States in the development of such co-operation.

69. The International Convention against the Taking of Hostages adds a new dimension to existing international legal measures to combat terrorism. The Convention seeks to ensure that international acts of hostage-taking will be covered either by the Convention itself or by the applicable conventions on the law of armed conflict.

70. There are various deficiencies relating to the global anti-terrorist conventions described above even with respect to those that have been in force for a number of years. The number of States Parties is disappointingly low. In addition, none of the conventions covers one of the tactics most often used by terrorists, i.e. the deliberate targeting by bombs or other weapons of the civilian population.

71. None the less, a growing consensus appears to be emerging that acts of violence against certain targets cannot be tolerated, regardless of reason or

motivation. Some experts believe, therefore, that the adoption of an international convention that would make the deliberate targeting of such populations an international crime is an indispensable step.

72. Another gap in current law concerns the possibility of terrorist use of weapons of mass destruction. It is recognized that this is a difficult area, but the dangers of terrorist use of such weapons may stimulate greater international co-operation.

73. A major problem with the conventions is that they have not been implemented vigorously. Some experts have recommended that the United Nations should establish a committee to oversee the implementation of the International Convention against the Taking of Hostages. The possibility of establishing similar committees to oversee the implementation of other anti-terrorist conventions might be considered.

D. Prevention and control strategies

74. In view of the growing transnational dimension of the phenomenon, measures against terrorism are needed both nationally and internationally. Studies of the patterns and methods of operations used by terrorists reveal well-established channels of co-operation and exchange of information between terrorist groups. Such co-operation includes providing refuge or safe passage, as well as financial and in-kind support. Effective counteraction requires a degree of bilateral or multilateral co-operation in almost every case. In certain regions, this co-operation is becoming more important. In Europe, where control over international borders is becoming increasingly loose, traditional means of impeding the movement of terrorists are no longer fully available. In other regions, such as Latin America, operations are simply moved to another country in the region when action against terrorists becomes more effective in one country. Recent developments in Eastern Europe are bound to facilitate terrorist actions across national borders against targets which were previously not so easily accessible.*

75. Certain principles are widely accepted when designing measures against terrorism. Constitutional guarantees and respect for human rights should be of primary concern. The unwavering commitment of Governments to the protection of the rights of their citizens is as important as the defences against victimization. Propaganda efforts of terrorists seek publicity and support for their actions; therefore, developing positive public support should be central in Government efforts against terrorism. The role of the media in this respect is critical. In addition to using reasonable self-restraint, they should assist in educating the public and keep it informed of the problem and the ways to solve it. Governments and the media are aided in this by terrorist atrocities that put terrorism in perspective.

76. Legislation is equally important. Terrorist activities should be criminalized with severe penalties prescribed and appropriate publicity given so that these acts will be fully prosecuted. Training law enforcement personnel or special units is as crucial as improving judicial response by affording

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*See the report of the Seventh Joint Colloquium of four major non-governmental organizations in consultative status with the Economic and Social Council, as part of the substantive preparations for this topic, held at Bellagio, Italy, from 4 to 7 May 1990 (A/CONF.144/NGO.1); a full report on the proceedings of this Colloquium will be submitted to the Congress, providing information on theoretical discussions on this topic.

to those involved effective protection from reprisals. The interfaces of international terrorism with political power sometimes pose major problems for law enforcement and the administration of justice. The independence of the judiciary is of paramount importance and the creation of specialized courts may be desirable.

77. National measures should also include specialized training of personnel entrusted with the extremely sensitive tasks of negotiating with terrorists, especially in hostage crises. The knowledge and flexibility required in handling these situations are skills that are not included in the basic training of law enforcement officials.

78. Efforts against terrorism must also protect its victims. The initiatives of certain countries to include in their legislation specific provisions affording victims of terrorist acts special protection and additional compensation could serve as useful models for other interested countries. The implementation of similar measures would significantly contribute to gaining the support of the public.

E. International co-operation

79. International co-operation is a sine qua non of effective action against terrorism. Accession and adherence to existing international instruments are particularly important. States should co-operate to ensure that no safe haven exists for terrorists anywhere in the world and that their demands are firmly rejected.

80. Action has been taken at the regional level between countries facing especially acute problems with terrorism. The Council of Europe, whose member States have been particularly exposed to attacks by international terrorists, has drawn up a resolution to co-operate "in measures to counter terrorism involving abuse of diplomatic or consular privileges and immunities and terrorism directed at diplomatic or consular representatives".* It was resolved that if one member of the Council of Europe suffered from an act of terrorism encouraged by a State, the Member States would consider what action they might take jointly or individually and in accordance with international and domestic law, to respond and in particular to make clear to the offending State that such behaviour was unacceptable. Similarly, in 1987, the South Asian Association for Regional Co-operation adopted a regional convention on the suppression of terrorism.

81. The Committee on Crime Prevention and Control, at its eleventh session, adopted decision 11/111 recommending that the Economic and Social Council transmit to the Eighth Congress a draft resolution on terrorist criminal activities. An annex to the draft resolution contains a set of measures against international terrorism. In addition to covering a wide area of possible action by the international community, these recommendations include a new Model Treaty on Mutual Assistance in Criminal Matters, which, together with the new Model Treaty on Extradition, could significantly improve the responses of Member States to terrorist activities.

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*Resolution No. 3 of the Ministers of the member States of the Council of Europe taking part in the European Conference of Ministers responsible for combating terrorism (see A/42/519, sect. II.B).

III. LINKAGES BETWEEN ILLICIT DRUG TRAFFICKING, ORGANIZED CRIME AND TERRORIST CRIMINAL ACTIVITIES

82. Under certain circumstances, an interplay of forces between organized crime and terrorist groups may emerge. In some regions, the close alliance between criminal organizations and terrorists or insurgent guerrilla groups has developed to an alarming extent, especially in connection with illicit drug trafficking. In the past, criminal organizations have often viewed law enforcement success in interrupting their operations as part of the "cost of doing business", accepting their losses in order to avoid provoking Governments into further and stronger action. Now, with stricter legislative and law enforcement measures developing around the world, major trafficking channels of illicit goods and services like drugs have been disrupted and the criminal organizations are increasingly defending their "turf" with violent means. 19/

83. Thus, the phenomenon of "narco-terrorism" has emerged largely because of the desire of drug traffickers to take advantage of the available structures, firepower and training of the terrorist groups, which in turn were attracted by the vast amounts of money offered and the new opportunities made available for financing and profiting from previously financially unrewarding activities. Drug-trafficking organizations have repeatedly used terror to intimidate Governments and their judiciary, police or military, in order to keep their members from being apprehended, prosecuted and incarcerated or extradited. The increasing use of violence by drug producers and traffickers against drug control efforts, as well as the dealing in drugs for arms and the financing of terrorists through illicit drug trafficking or its cash profits are now seen to pose severe threats to the security and institutional stability of nations and the well-being of their peoples.* Accordingly, in resolution 44/72 of 8 December 1989, the General Assembly, inter alia, requested the Eighth Congress to pay particular attention to the linkages between illicit drug trafficking, organized crime and terrorist criminal activities, and to propose viable control measures.

84. Further, General Assembly resolution S-17/2, annex, of 23 February 1990 expressed alarm at the growing link between illicit trafficking in narcotic drugs and terrorist activities aggravated by illicit or covert arms transfers, as well as by illegal activities of mercenaries, and the Global Programme of Action calls for measures to be taken to prevent illicit and covert transfers of arms and explosives and their diversion to illicit drug traffic-related activities.

85. An attempt to co-ordinate activities within the United Nations system was made in the report of the Secretary-General on the United Nations System-Wide Action Plan on Drug Abuse Control (E/1990/39), submitted to the Economic and Social Council during its second regular session of 1990. The System-Wide Action Plan states, in paragraph 155, inter alia, that the Eighth Congress may therefore increase the mandates of the Crime Prevention and Criminal Justice Branch of the Centre for Social Development and Humanitarian Affairs.

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*For the current situation world-wide, see the report of the International Narcotics Control Board for 1989 (E/INCB/1989/1). See also report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, from 17 to 26 June 1987 (United Nations publication, Sales No. E.87.I.18).

86. In paragraph 60 of the Global Plan of Action, the United Nations, in particular the United Nations Fund for Drug Abuse Control, is requested to assist States, at their request, in equipping and strengthening their law enforcement authorities and criminal justice systems in their efforts against illicit trafficking.

87. The Global Programme of Action recommends measures to be taken against the effects of money derived from, used in or intended for use in illicit drug trafficking, illegal financial flows and illegal use of the banking system, and calls upon the United Nations to provide advice and legal and technical assistance, in co-operation with the regional United Nations institutes, to enable States to adapt their legislation to international conventions and decisions dealing with drug abuse and illicit trafficking. States are invited to give consideration to the model treaties on mutual assistance in criminal matters and on extradition, submitted to the Eighth Congress and the study and promotion of measures to protect the judiciary from any exposure and intimidation threatening its independence and integrity are called for.

88. The Commission on Human Rights, in its resolution 1990/75 of 7 March 1990 on the consequences of acts of violence committed by irregular armed groups and drug traffickers for the enjoyment of human rights, noted that such acts prevented the unimpeded exercise of civil and political rights, as well as the exercise of economic, social and cultural rights, and requested the Secretary-General to collect information on this question from all relevant sources, as a matter of high priority.

IV. CODIFICATION OF INTERNATIONAL CRIMINAL LAW AND ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

A. Codification of international criminal law

89. International lawyers and scholars have repeatedly advocated developing a comprehensive international approach to deal with transnational crimes. It is argued that the lack of such an approach has led to unrelated, unco-ordinated and ineffective international action.

90. United Nations efforts to deal with the issue date back to the International Law Commission, in 1947. The idea was to elaborate a draft code of crimes against the peace and security of mankind, but the efforts were frustrated, in part by definitional questions as to what constitutes an international crime, but mainly by the adverse climate in international relations at the time. In spite of the fact that an initial draft had been prepared by 1954, further consideration was forestalled in connection with the definition of aggression. This matter was resolved 20 years later, in 1974, coinciding with a period of relaxation of international tensions. The draft code became again an item on the agenda of the General Assembly in 1978 and, in 1981, the International Law Commission was requested to resume its work, suspended since 1954. Codification was discussed again in 1982 and the Commission concluded that the scope of the draft code, rationae materiae, should encompass only the most serious international offences, to be determined by reference to a general criterion and to the relevant conventions, and it should be limited to the criminal responsibility of individuals. 20/

91. There are a number of issues pending before the Commission that seem to require particular attention, such as the attribution to individuals of acts

constituting a crime against the peace and security of mankind, the implementation of the draft code and, in particular, the possible establishment of an international criminal jurisdiction.

92. The views of many experts seem to converge on the necessity for a new approach to international criminal policy and criminal law. Such an approach would be based on a number of considerations, including the following:

(a) Identification of the international social interest sought to be protected and the international harm sought to be averted;

(b) Assessment of the seriousness of the prohibited conduct and the inherent dangerousness of it;

(c) Recognition of the degrees of general deterrence sought to be generated by international criminalization in the light of the degree of certainty of prosecution.

93. Advocates of this approach propose that an international offence should be defined as conduct internationally proscribed, for which States have an international duty to criminalize, prosecute or extradite, punish the offender and co-operate with other States in the implementation of the duty. International offences should be categorized in the light of their international seriousness. Three categories are suggested: the more serious offences, usually the product of State action (e.g. war crimes); offences that are not the product of State action (e.g. piracy, aircraft hijacking and drug offences); and other international infractions in respect of particular areas (e.g. bribery of foreign public officials). Principles of international criminal responsibility are also suggested, including the principle that defence based on obedience to superior orders should not be acceptable, unless the offender was compelled by immediate threat commensurate with or greater than the actual harm committed. Similarly, heads of State and diplomats should not be immune from individual criminal responsibility; and standards of State responsibility should be established, including responsibility for restitution when an act is committed on behalf of, or for, the benefit of a State.

94. These experts also advocate the integration of modalities of international co-operation, including those concerned with extradition, mutual assistance in criminal matters, and the transfer of proceedings and prisoners. A number of regional and subregional arrangements have developed at the multilateral level, such as those between Latin America and the United States of America, the Arab States, the Benelux countries, the Council of Europe, the Scandinavian countries and the Commonwealth countries, but none of them integrates the various modalities into a comprehensive codified form. A comprehensive approach could reduce the loopholes or gaps left by the accidents of historical development.

95. Assuming that consensus exists regarding the international character of certain crimes, enforcement at the present stage depends on enacting national legislation embodying such crimes and providing support for the operation of multilateral and bilateral arrangements for international co-operation, including the principle of aut dedere aut judicare. The normal procedure is for a State to assume jurisdiction to apprehend, prosecute, try and punish, or extradite, the alleged perpetrator of a crime, even if the crime had not been committed within its territorial boundaries. The problem is that the assertion of extraterritorial jurisdiction has not been uniform or based on

clearly defined principles, in the practices not only of different States, but also of national courts. The principle of hostis humanis generis seems to be almost universally accepted. Its usefulness, however, appears limited in so far as new forms of criminality are concerned, or when different interpretations are attached to certain criminal activities e.g. the political offence exception regarding terrorist criminal activities invoked in cases of extradition. Conversely, assertion of extraterritorial jurisdiction may be viewed as an inadmissible violation of State sovereignty.

96. The International Law Commission, at its 1989 session, discussed extensively the draft code of crimes against the peace and security of mankind and considered a proposal that drug trafficking should be incorporated into the draft Code as a crime either against peace or against humanity, or both. In this connection, the Special Rapporteur was requested to prepare a draft provision on international drug trafficking for its next session. 21/

B. Establishment of an international criminal court

97. The General Assembly, by its resolution 44/39 of 4 December 1989, requested the International Law Commission to examine the possibility of establishing an international criminal court, which subject had been introduced on the initiative of Trinidad and Tobago. The agenda item was entitled "International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes". A number of States felt that the need was urgent for an international approach to the global criminal problem of illicit drug trafficking that would assist the few national legal systems that bear an overwhelmingly disproportionate share of the burden of prosecuting international drug traffickers. They also felt that this approach would be helpful in combating drug trafficker assaults on the judiciary and the legal machinery in those States, and would avoid the potential effects of large and powerful countries extending their jurisdiction beyond their own borders.

98. An international criminal court could provide specialized machinery to deal with international crimes in a competent and expeditious manner, have advantages over the national courts of different States in terms of impartiality, objectivity and consistency, and mitigate the problem of extraterritorial jurisdiction that often arises in bilateral arrangements. The court would not replace national jurisdiction, since it would have jurisdiction only over an agreed list of international offences and would not impinge on State sovereignty because the consent of States would be a prerequisite.

99. Other States were sceptical and thought that the question required further study by the International Law Commission. A number of countries were non-committal. Although they accepted the need to develop international legal means to solve the problem and recognized that establishing an international court, if feasible, would enhance the efficiency of the international criminal justice system, they pointed out the great complexity of the issues that had to be solved. The debate indicated that the majority felt this was too complicated a matter to have a substantive General Assembly decision without first having the opinion of the International Law Commission. It was finally decided to request the Commission to consider the question of international criminal jurisdiction in a broad sense, in terms of an international criminal court or other international criminal trial mechanism. During the debate, one possible mechanism mentioned was a special chamber of the International Court of Justice with criminal jurisdiction, which could be made available to States as an alternative to national jurisdiction.

100. Various models have been suggested for the establishment of an international criminal court during the past 50 years. In addition to the suggested expansion of the jurisdiction of the International Court of Justice, the establishment of an international commission of inquiry was proposed either as an independent organism, as part of the international criminal court, or as an organ of the United Nations. Such a commission would investigate and report on violations of international criminal law, through fact-finding and inquiry bodies. This non-adjudicative model was described in a draft statute for an international commission of criminal inquiry and a draft statute for an international criminal court developed by the International Law Association at its Sixtieth Conference in Montreal, in 1982.

101. A third alternative would be the establishment of a court, pursuant to a multilateral convention, whereby Member States parties to it would grant jurisdiction to the court to adjudicate certain specified offences embodied in international conventions, as well as the authority to detain those accused and those convicted. A further proposal calls for the establishment of regional criminal courts.

102. One of the primary concerns in the establishment of an international criminal court is its statute, both in terms of substantive and procedural content, as well as organization of work and composition. There have been numerous proposals in this regard, and various models. According to one model, the court would have universal jurisdiction to adjudicate and punish persons and legal entities in respect to any of the crimes contained in an international criminal code or any other international offence that may be embodied in a supplemental agreement. Competence would be exercised in accordance with article 38 of the Statute of the International Court of Justice. The court, upon entering a finding of guilty, would have the power to impose a number of sanctions, including deprivation of liberty in the case of natural persons, or fines, injunctions and orders for restitution and damages. Criminal process would be initiated on a complaint made to the procuracy established by the statute. Provisions would be made for appeals and the procedure for convening the court.

103. According to the above-mentioned model calling for the establishment of the court by multilateral convention, jurisdiction would be based on a form of transfer of criminal proceedings and, as a result of this, the court would use the substantive law of the transferring State. This approach would alleviate some jurisdictional and sovereignty problems. Prosecution would be carried out by a prosecuting authority of the court assisted by the prosecuting officials of the transferring State, whose law is to be applied, on the basis of criminal charges brought by a member State. A member State that would not have subject-matter or in personam jurisdiction, or that would not wish to bring criminal charges within its jurisdiction, would be able to petition the prosecuting authority to initiate direct prosecution by the court.

104. A variation of this model, which also meets some of the major concerns that have been expressed recently, is that jurisdiction of the court would not be universal, but exercised on behalf of the States that have signed the instrument of its establishment, while use of the Court would be optional and not mandatory. Its operation could be limited to the regional level instead of being global and its competence would specifically exclude States and be limited to individuals. This competence would, however, extend beyond drug-related offences to cover terrorist acts as defined in multilateral conventions already in force. The court would be part of a framework of international co-operation, including extradition, transfer of criminal

proceedings, mutual assistance in criminal matters, transfer of prisoners and enforcement of penal judgements. In this way, gaps in exercisable jurisdiction, such as those occurring in cases of refusal to extradite combined with reluctance to prosecute, would be eliminated. Also, expansion of the court's jurisdiction would be left to an evolutionary process. 22/

105. The Working Group established by the International Law Commission at its forty-second session has recently delivered its report (A/CN.4/L.454 and Corr.1), which after adoption by the Commission will become part of its report to the General Assembly. It states that recent developments in international relations and international law have contributed to increasing the feasibility of the establishment of an international criminal court. Among the reasons for this, the Working Group noted that organized international crime has achieved such wide dimensions that it can endanger the very existence of States and seriously disturb international relations. While the final acceptability of the proposed court would largely depend on the form that it would take, various alternatives were outlined.

106. Noting that one of the recognized advantages of an international criminal court would be the uniform and objective application of the law and the removal of inter-State aspects of disputes, the Working Group concludes that there are at least three possible models, varying mainly with respect to the competence and jurisdiction of the court. According to these, the court could either have exclusive jurisdiction, concurrent jurisdiction with national courts or only a review competence. It is also deemed possible to combine elements of the envisaged models, while its competence rationae materiae could be extended or limited. The establishment of an international court is thus seen as a progressive step towards the development of international law, to be accepted by all States.

107. A consideration of the various proposals mentioned above shows that the most recent ones have adopted a more pragmatic approach. For the first time, the issue is viewed from the enforcement perspective. In addition to addressing the inherent deficiency of international law, the matter is approached from a criminal liability point of view in the strict penalty-oriented sense of the concept. One of the proposals for the jurisdiction of the court is that it be confined to certain crimes, thereby making it considerably limited and thus better defined. The court is seen as an integral part of concerted international action against crimes such as terrorism and illicit drug trafficking. The issues involved remain, however, highly sensitive and controversial. In addition to political considerations, matters such as the jurisdiction of the proposed court are liable to create legal problems of a constitutional nature to a number of national legislations, but such problems can be solved if the will exists. Some of the proposals are based on the relaxation of international tensions and the resulting rapprochement of formerly divergent attitudes, which is conducive to success in delicate political negotiations. The world is now witnessing unprecedented positive developments of the international climate and this opportunity should be used.

V. NEW MODEL TREATIES

108. In response to Seventh Congress resolutions 1 and 23, and on the recommendation of the Committee on Crime Prevention and Control, the Economic and Social Council, by its resolution 1990/23 of 24 May 1990, transmitted to the Eighth Congress three draft model treaties and two sets of recommendations. The model treaties, briefly described below, are based primarily on the results

of the interregional preparatory meeting for the Eighth Congress on topic III, held at Vienna from 14 to 18 March 1988 (A/CONF.144/IPM.2). They were further reviewed by the Committee on Crime Prevention and Control at its tenth session, and endorsed by the Economic and Social Council in its resolution 1989/69 of 24 May 1989. The texts before the Congress reflect the comments made by the Committee at its tenth and eleventh sessions, as well as the observations made during the five regional preparatory meetings for the Eighth Congress (A/CONF.144/RPM.1-5).

A. Model Treaty on Mutual Assistance in Criminal Matters

109. A revised version of the Model Treaty on Mutual Assistance in Criminal Matters was submitted, as conference room paper E/AC.57/1988/CRP.4, to the Committee on Crime Prevention and Control at its tenth session for guidance concerning further follow-up. In pursuance of the directives of the Committee, 23/ the Model Treaty was extensively circulated among Governments and individual experts for comments and suggestions, and the Secretariat held intensive consultations with representatives of Governments during the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1988. A revised draft was submitted to the five regional preparatory meetings for the Eighth Congress and to the Seventh Joint Colloquium of the International Association of Penal Law, the International Society of Criminology, the International Society of Social Defence and the International Penal and Penitentiary Foundation, all of which made observations on, and voiced support for, the draft Model Treaty.

110. The Model Treaty was brought to the attention of representatives of Governments attending the Second Interregional Meeting of Heads of National Drug Law Enforcement Agencies (HONLEA), 24/ which recommended that all States should support the elaboration of a United Nations model bilateral treaty on mutual assistance consistent with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (E/CONF.82/15 and Corr.2), adopted in 1988. The Model Treaty was subsequently finalized taking into account the comments of a group of experts that met at Vienna in October 1989, on the occasion of the XIV International Congress on Penal Law, as well as the observations of the Committee on Crime Prevention and Control at its eleventh session.

111. In the elaboration of the Model Treaty, special consideration was given to the following issues: scope of application; refusal of assistance; contents and execution of a request; confidentiality; obtaining evidence; availability of persons in custody and other persons to give evidence or assist in investigations; safe conduct; provision of documents; and search and seizure. 25/

112. The Model Treaty seeks to enhance mutual assistance in criminal matters between Member States in order to cope with serious transnational criminality. The assistance may involve arrangements, subject to appropriate safeguards, for prisoners and other persons to travel from a State to a foreign country, at that country's request, and vice versa, to give evidence in criminal proceedings or to assist in a criminal investigation. On the basis of the Model Treaty and its Optional Protocol, States could also develop mutual assistance in connection with the seizure of crime proceeds, foreign forfeiture registration, pecuniary penalty and restraining orders; warrants in relation to goods and property that are the proceeds of crime; applications for interim restraining orders pending registration of corresponding foreign orders; and application for monitoring and production orders in relation to accounts in financial institutions and documents relevant to the money trail.

B. Model Treaty on Extradition

113. Similar procedures were followed for the finalization of the Model Treaty on Extradition. It was submitted, in a revised version, to the Committee at its tenth session, as conference room paper E/AC.57/1988/CRP.3.

114. The Model Treaty focuses, inter alia, on the question of extraditable offences; binding and optional grounds for refusal to extradite; postponed or conditional surrender of the person and of property; the rule of speciality transit; and surrender to a third State.

115. In addition to utilizing the existing treaties, new trends in extradition guided the elaboration of the Model Treaty. They include a wider basis for extradition arrangements, dropping the requirement to establish a prima facie case, abolition of the list-of-offences approach in favour of referring to offences with a minimum penalty, and permitting a State to prosecute its own citizens for offences committed in another country where extradition is not possible. A further example is the need for provisions for temporary surrender, to enable a prisoner to stand trial in another country and then be returned to serve his or her sentence. By this means it may be possible to deal more effectively with major drug rings.

116. Once it has been established that an extradition request and the documents supporting it satisfy the requirements of the Model Treaty and that the offence is an extraditable one, the requested State is in principle under the obligation to extradite the person claimed to the requesting State; that is, unless the requested State is able to invoke a valid reason for refusing extradition.

117. In an attempt to assist in the classification of the various grounds for refusal that can be found in customary international law and in national laws, the Model Treaty distinguishes five categories of exceptions, relating to:

(a) The nature of the offence;

(b) The personal status or situation of the offender;

(c) The protection of the individual against an unfair trial or against inhuman or degrading punishment in the requesting State;

(d) The priority of the jurisdiction of the requested State in cases where the offence also forms a breach of the law of the requested State;

(e) The maintenance of reciprocity in extradition relations.

118. In particular, the Model Treaty seeks to impose limits on the political offence exception. This is done by excluding from exception crimes recognized by the international community in multilateral treaties as being especially serious. Provision is made to allow the contracting parties to agree on additional grounds that would limit the political offence exception.

119. The consequences of refusing extradition may be softened when the requested State is prepared to accept the transfer of the proceedings or the transfer of the execution of a penal judgement. The requested State may in some cases more easily decide against extradition because it prefers an alternative form of international co-operation. In other cases, the existence of alternatives may take away traditional objections against extradition:

instead of refusing extradition on the basis of the nationality of the offender, the requested State could grant it under the condition that, in case of a conviction in the requesting State, the individual would be transferred to the requested State to serve his or her sentence.

C. Model Treaty on the Transfer of Proceedings in Criminal Matters

120. The Economic and Social Council, in its resolution 1986/10, section VII, of 21 May 1986, requested the Committee on Crime Prevention and Control to formulate a model agreement on the transfer of criminal proceedings for possible consideration by the Eighth Congress. This request was based on resolution 12 of the Seventh Congress, in which the Committee was requested to study this subject and to consider the possibility of formulating a model agreement.

121. Drawing on the experience gained from existing bilateral and multilateral arrangements in this area, as outlined in document E/AC.57/1988/6, the Model Treaty gives primary importance to the interests of the States involved. 26/ None the less, the interests of both the suspected offenders and the victims are taken into consideration and reflected in the Model Treaty. The most likely field of application for such a treaty would be when an accused has returned to his or her State of nationality and an extradition request would be futile since that State does not extradite nationals.

122. As far as possible, the Model Treaty avoids mandatory rules since the legal and administrative systems and penal philosophy of States belonging to different regions, as well as cultural and legal traditions, differ greatly. The majority of issues are regulated by optional rules and it is left to specific bilateral arrangements or multilateral conventions to transform them into mandatory ones in accordance with the needs and possibilities of inter-State relations.

123. One important aspect thereof is that, according to the Model Treaty, the ordinary residence or nationality of the suspected persons is not a precondition for the transfer of proceedings, but the lack of it could constitute an optional ground for refusal to initiate proceedings in the requested State. Bilateral or multilateral agreements might stipulate, however, that ordinary residence or nationality may constitute a precondition for the transfer.

Notes

1/ Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985 (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. A.

2/ See the report of United States Advisory Committee on Criminal Justice and Goals, in Organized Crime Report of the Task Force on Organized Crime 7 - 8 (1976) for one attempt to review organized crime.

3/ R. Reuter, "Methodological problems of organized crime research", in Major Issues on Organized Crime Control, H. Edelhertz, ed. (Washington, D.C., National Institute of Justice, 1987).

4/ E. U. Savona, "Crime and its organization, hypotheses and strategies", paper presented at the Interregional Preparatory Meeting for the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders on Topic III, held at Vienna, from 14 to 18 March 1988.

5/ D. R. Cressey, Theft of the Nations: The Structure and the Operation of Organized Crime in America (New York, Harper and Row, 1969).

6/ F.A.J. Ianni, Black Mafia: Ethnic Succession in Organized Crime (New York, Simon and Schuster, 1974).

7/ See A. Anderson, The Business of Organized Crime (Stanford, California, Hoovers Institution Press, 1979).

8/ See P. Reuter, Racketeering in Legitimate Industries, Rand Corporation - National Institute of Justice, Washington, D.C., 1987 and New York SOCTF, Corruption and Racketeering in the New York City Construction Industry, Interim Report, June 1987.

9/ Council of Europe, Draft Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 25 April 1990) and draft explanatory report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 26 April 1990).

10/ Commission of the European Communities, Council Directive on Prevention of the Financial System for the Purpose of Money Laundering (Brussels, 23 March 1990) (COM (90) 106 final - SYN 254).

11/ "Prevention of criminal use of the banking system for the purpose of money-laundering" (Basel, Switzerland, Committee on Banking Regulations and Supervisory Practices, December 1988).

12/ Report of the Financial Action Task Force on Money Laundering (May 1990), p. 11; this definition was clearly drawn from the Vienna Convention, article 3. The Task Force recommended that countries should consider the extension of the offence of drug money laundering to other crimes.

13/ See A/C.6/418, annex I.

14/ For the texts of the Geneva Conventions of 1949, see United Nations, Treaty Series, vol. 75, Nos. 970-973, and of the Supplementary Protocols, see A/32/144, annexes I and III.

15/ Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 37 (A/34/37).

16/ United Nations, Treaty Series, vol. 704, No. 10106, p. 219.

17/ Ibid., vol. 860, No. 12325, p. 106.

18/ United States, Treaties and Other International Agreements, vol. 24 (1973), p. 268.

19/ Narcotics Control Digest, vol. 20, No. 10 (9 May 1990), p. 1.

20/ Report of the International Law Commission, forty-first session, 2 May-21 July 1989, Supplement No. 10 (A/44/10), chap. III.

21/ Ibid., pp. 170-171.

22/ See Congressional Record, Proceedings and Debates of the 101st Congress, Second Session, vol. 136, No. 77 (Washington, D.C., 18 June 1990), S 8080-89.

23/ Official Records of the Economic and Social Council, 1988, Supplement No. 10 (E/1988/20), chap. I.

24/ "Development and promotion of more effective action against illicit drug trafficking through regional co-operation in drug law enforcement: Second Interregional Meeting of Heads of National Drug Law Enforcement Agencies" (Interregional HONLEA), Vienna, 11-15 September 1989 - report (E/CN.7/1990/2).

25/ See also Ekkehart Muller, "Judicial assistance and mutual co-operation in penal matters: the European system", in International Criminal Law, vol. II, M. Cherif Bassiouni, ed. (New York, Dobbs Ferry, 1986), pp. 93-119.

26/ See also Julian Schutte, Transfer of Proceedings, the European System, ibid., pp. 319-335.